# Without an Umbrella in a Rainstorm:

# The Significance of *Shelby County v. Holder* (2013)

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## Introduction

In 2013 the Supreme Court, in yet another landmark decision decided by a 5-4 split, ruled that major sections of the recently reauthorized Voting Rights Act were unconstitutional. The decision made in *Shelby County v. Holder (2013)* has caused immense damage to the Voting Rights Act (VRA), and subsequently the delicate balance between judicial and legislative authority. The interaction between Congress and the Court in this case is unprecedented and has caught the attention of many legal scholars.[1] Within the context of a hyper-polarized nation, this constitutional challenge of Congress's legislative authority by the Court can have intense future implications. The Court's challenge that Congress overstepped their Fifteenth Amendment powers with the VRA's preclearance clause has a ripple effect. First, it supplants the legislative actions of Congress with a Supreme Court ruling in a manner never before seen. Second, it debilitates the enforcement powers and tangible impact of the VRA on a widespread scale. Lastly, it speaks to the legacy of racism and the contemporary role which race plays as a factor of political polarization. Amid the bitter partisan competition for power in the wake of the Trump presidency, the multidimensional impact of the *Shelby* decision is starker and more consequential in 2022 than when it made the front pages in 2013.

Unfortunately in the same breath, the Supreme Court was able to wound Congressional power and the VRA with unmatched damage in *Shelby County v. Holder*. Particular provisions of the VRA, working in concert with one another, have had their effectiveness crippled in service of

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[1] Christopher Elmendorf and Douglas Spencer, "Administering Section 2 of the Voting Rights Act After Shelby County," Vol. 115, No. 8, *Columbia Law Review*, (2015); Christopher Elmendorf and Douglas Spencer, "The Geography of Racial Stereotyping: Evidence and Implications for VRA Preclearance After Shelby County," *California Law Review*,( 2014); Tomas Lopez, "'Shelby County': One Year Later," *Brennan Center for Justice,* June 24, 2014; Edward K. Olds, "More than 'Rarely Used': A Post-"Shelby" Judicial Standard for Section 3 Preclearance." *Columbia Law Review* 117, no. 8 (2017); Ryan Post, "The Implications of Shelby County v. Holder: How the Supreme Court Undid Fifty Years of Social Progression," *Seton Hall Law,* (2015); Albert Samuels,"Shelby County v. Holder: Nullification, Racial Entitlement, and the Civil Rights Counterrevolution," *Ralph Bunche Journal of Public Affairs 4*, no .1 (2015); Nicholas Stephanopoulos, "The South After Shelby County," *The Supreme Court Review*, January 2014.

state legislatures. There has been much political strife surrounding the ruling, as Democrats and voting right activists have mourned the loss of VRA preclearance protection which they claim to have been crucial in the ongoing battle for minority enfranchisement. The removal of Section 4(b), and implied nullification of Section 5 preclearance, leaves disenfranchised minorities to find relief in Section 2. While previously covered jurisdictions claim this is an adequate remedy to voting rights issues that may occur, activists point to the burdens being shifted from states to ill-equipped individuals. Instead of proving a law won't have discriminatory impacts, harm must be done, and those impacted by this discrimination must expend the time and money to find legal resolution. This scramble to protect voting rights in the wake of *Shelby* has caused alarm amongst minority groups and Democratic leadership.

Certain legislators, predominantly Republican, seek electoral victory through the perceived benefits of suppressing the minority vote. Almost every jurisdiction that fell under preclearance was a Republican led state or county. Once preclearance was lifted, states like Texas were swift in implementing new second-generation barriers to the ballot such as voter identification laws. Such legislation may appear neutral, but necessarily targets minorities and the impoverished in accessing their enfranchisement rights. These Republicans claim that changes to the voting procedure are in service of electoral integrity and prevention of voter fraud, which are threats founded on little evidence. Republicans have not been the sole perpetrators of voter suppression throughout the nation's history, yet a common thread of disenfranchisement has been sentiments of white supremacy. Thomas Mann, Resident Scholar of U.C. Berkeley Institute of Governmental studies, summarizes "Republicans believe, correctly, in most cases, that minorities and young adults disproportionately support Democrats. Reducing their turnout

works to the advantage of Republicans."[2] This serves as a motivating factor in the removal of Section 4(b) of the Voting Rights Act in the *Shelby* decision.[3] This decision validated the common Republican argument of states' rights and cleared the path for a simpler procedure to legislate with intentions to racially disenfranchise.

The multi-layered effects caused by this case have solidified its unique impact on voting rights and constitutional law. Disenfranchisement of racial and ethnic minorities threatens the basis of democratic institutions and the notion of "one person, one vote" in the United States. A threat to equality and voting rights such as this should be taken with grave seriousness. Legislators in the House of Representatives have recognized this and responded by passing HR-1 and HR-4. The For the People Act (HR-1) and the John Lewis Voting Rights Advancement Act (HR-4) are the clearest attempts by Congress to bolster the Voting Rights Act in the post-*Shelby* partisan climate. This context of politicized racial oppression, the significance of the vote in American democracy, and the tension of defining legislative boundaries adds to the gravity of the *Shelby County v. Holder* decision which demands the passage of HR-1/ HR-4.

Justice Ruth Bader Gibsburg writing on behalf of the dissent was impassioned by the flawed logic of the majority claiming "Throwing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet."[4] The United States may not be facing the suppression that compelled Congress to pass the VRA in 1965, but the rain continues to fall. Justice Ginbsurg rightfully disapproves of the idea of abandoning legal protections for voters when their challenges have not been eradicated. Minorities in the present day are facing hurdles

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[2] Edward Lempinen, "Stacking the Deck: How the GOP Works to Suppress Minority Voting," *Berkeley Law Journal*, September 29, 2020, pg 3.
[3] Tom McCarthy, "How Republicans are Trying to Prevent People from Voting after 'Stop the Steal'," *The Guardian*, April 7, 2021.
[4] *Shelby County Alabama v. Holder*, 570 U.S. 529 (2013), pg 33.

to their enfranchisement rights, hurdles that act as rain drops the VRA could deflect with its preclearance powers. *Shelby County v. Holder* served as the final puncture to America's umbrella allowing the rain to pour down onto a vulnerable electorate. It is with HR-1 and HR-4 that this umbrella can be refortified.

## The Voting Rights Act

Democracy as a principle relies on the participation of all citizens in the electoral process, which necessitates access to the vote. A new wave of racial injustice has been enforced state-by-state via voter suppression tactics. Written to bolster the Fourteenth and Fifteenth Amendments, the Voting Rights Act was passed under President Lyndon Baines Johnson in 1965. The rights constitutionally granted through these amendments were meaningful in theory, but their implementation in the reconstructionist and then Jim Crow South was feeble.[5]As a crescendo to the Civil Rights Movement, the Voting Rights Act set out to solidify and enforce the anti-discrimination principles of the Fifteenth Amendment. It is from this imperative law that decades of democratic protection was made possible through minority representation, ballot access, and federal oversight.[6]

> The Voting Rights Act has dramatically reshaped the political landscape of the United States… it has helped substantially expand political opportunities for minority voters and has contributed to the radical realignment of Southern politics… A voluminous empirical literature attributes the VRA with increased rates of Black voter turnout; successful Black candidates elected to municipal offices, state legislatures, and Congress.[7]

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[5] Bernard Grofman and Chandler Davidson, "Controversies in Minority Voting: The Voting Rights Act in Perspective," the *Brookings Institution*, 1992, pg 9.
[6] Sophie Schuit and Jon C. Rogowski, "Race, Representation, and the Voting Rights Act," *American Journal of Political Science*, 2017, pg 513.
[7] Schuit and Rogowski, "Race, Representation, and the Voting Rights Act," pg 513.

In addition to this new representation in office, voters of Color pressured incumbents to become more responsive to their preferences in order to maintain electoral power. As the ballot became more accessible to Black Americans, legislators had little choice but to become aware of their "new" constituents or be ready to move over.[8]

Other voter suppression tactics (like gerrymandering) that were not stringently prevented in the VRA could still be employed to prevent or devalue voting by people of color. Still, the protection of elections based on the illegality of voter ID laws, literacy tests, and short duration residency requirements was a transformative step for minority rights. These general principles of the VRA are secured through a few key provisions, the same ones at the heart of the *Shelby* case.

A closer look at the sections 2-5 of the Voting Rights Act which are relevant to the analysis of *Shelby County v. Holder* will be conducted here. Beginning with Section 2, this portion of the law echoes the Fifteenth Amendment in no unclear terms, declaring political bodies cannot legislate "to deny or abridge the right of any citizen of the United States to vote on account of race or color."[9] This is most frequently brought as reasoning in legal cases involving structures that show voter discrimination on a large scale, alongside the Fourteenth and Fifteenth Amendments. In this way, Section 2 is both general and somewhat easier to incorporate into judicial arguments. Unlike other portions of the VRA, this section does not have a set period of time for which it stands. Since the values of Section 2 are intended to embody universal principles of equality and democracy, Congress saw no need to put a time limit for renewal as opposed to Sections 4 and 5. In the mid 1980s Congress did amend Section 2 to list certain factors for which the Courts could adjudicate cases, essentially "it provides the opportunity for individuals (and the Attorney General) to enforce the Fifteenth Amendment through individual

[8] Bernard Grofman and Lisa Handley. "The Impact of the Voting Rights Act on Black Representation in Southern State Legislatures." *Legislative Studies Quarterly* 16, no. 1 (1991).
[9] Voting Rights Act of 1965, Pub. L. 89-110, 79 Stat. 437.

lawsuits."[10] This would come to be a prominent fallback the majority would argue should be used as a mechanism for VRA enforcement after their *Shelby* decision. Section 3 is presently being evaluated in similar light by voting rights activists.

Section 3 of the VRA is often overlooked - although it too contains a coverage measure, just one not as contentious as Sections 4 and 5, which a federal judge can enforce. It is commonly known as the bail-in portion of the VRA, since it circumvents the preclearance clause of Section 4(b) to achieve a similar goal of federal electoral oversight.[11] In order for a jurisdiction to be pulled into coverage under Section 3, violations of the Fourteenth and Fifteenth Amendments must be proven with discriminatory intent. Another key differentiating factor of this section is the ability for a court to set the preclearance period for as long as they see necessary, which can be altered to reduce or increase that duration when needed. It can also more directly target the central constitutional voting rights issues at hand by specifying the changes that must fall under the preclearance, leaving other voting changes untouched in the jurisdiction.[12] The precision of enforcement and requirement of discriminatory intent sets Section 3 apart from those undermined by the *Shelby* decision.

A common misconception of *Shelby County v. Holder* is that the Supreme Court struck down Section 5 of the VRA, however Section 4(b) which empowers Section 5 was the one rendered unconstitutional by the Court. Section 4(a) outlawed literacy tests as a form of ballot gatekeeping, and identified areas with conspicuous histories of racially charged voter suppression.[13] Section 4(a) was the bail-out provision, for jurisdictions could be exempt from Section 4(b) coverage if "during the preceding ten years the jurisdiction and its political

[10] Edward K. Olds, "More than 'Rarely Used': A Post-"Shelby" Judicial Standard for Section 3 Preclearance." *Columbia Law Review* 117, no. 8 (2017), pg 2190.
[11] Olds, "More than "Rarely Used": A Post-"Shelby" Judicial Standard for Section 3 Preclearance," pg 2193.
[12] Olds, "More than "Rarely Used": A Post-"Shelby" Judicial Standard for Section 3 Preclearance," pg 2195.
[13] Justin Levitt, "Before the United States Senate Committee on the Judiciary Subcommittee on the Constitution, Civil Rights and Human Rights New State Voting Laws: Barriers to the Ballot?," September 8, 2011, pg 4.

subdivisions have neither faced any lawsuits under the VRA or the race-discrimination privisons of the Constutution" and prove they have used "constructive efforts to better incorporate minorities into the political process and has banated any vestiges of discrimination."[14] When people say the preclearance clause was destroyed by *Shelby* they are correct - it was. However, preclearance was not removed in its entirety since Sections 4(a) and Section 5 still remain.

Section 4(b) of the VRA houses the coverage formula, now deemed unconstitutional by the Supreme Court. This section was the determinant of which states and counties could be pulled under the jurisdiction of Section 5. Like previous sections, this portion of the VRA required congressional renewal as jurisdictions and circumstances evolved prior to the *Shelby* decision. Section 4(b) engulfed:

> Jurisdictions where less than fifty percent of the voting-age population was registered to vote on November 1, 1964, or voted in the presidential election of 1964. Section 4(b) was subsequently amended in 1970 and 1975 to include states and jurisdictions that maintained a discriminatory test or device as of November 1 of 1964, 1968, or 1972, and those where less than half of the voting-age population was registered to vote or voted in the presidential elections of 1964, 1968, or 1972.[15]

The coverage formula at the time of its creation required a historical evaluation of areas with patterns of racial voter discrimination. Without legislators having to explicitly say they were targeting the South, the intention of Section 4(b) was to apply analytical means to ensure oversight of states who were clinging to a Jim Crow legacy.[16] States such as Alabama, South Carolina, and Virginia were totally engulfed by this coverage formula.[17] Section 4(b) could be

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[14] Christopher Elmendorf and Douglas Spencer, "The Geography of Racial Stereotyping: Evidence and Implications for VRA Preclearance After Shelby County," *California Law Review*, 2014, pg 1175.
[15] Olds, "More than "Rarely Used": A Post-"Shelby" Judicial Standard for Section 3 Preclearance," pg 2191.
[16] Elmendorf and Spencer, "The Geography of Racial Stereotyping: Evidence and Implications for VRA Preclearance After Shelby County," pg 1129.
[17] Tomas Lopez, "'Shelby County': One Year Later," *Brennan Center for Justice,* June 24, 2014, pg 1.

referred to as a facially neutral provision of the VRA that had a very specific intention. This would come to be picked apart on grounds of federalism and state equality by the Court during *Shelby*.

Section 5 is the preclearance clause, the portion of the VRA which empowers the Department of Justice then the District Court for the District of Columbia to evaluate voting laws prior to their changes in Section 4(b) covered jurisdictions. Like Section 4, this was also time-bound and needed renewal upon expiration. The extent to which Section 5 could require preclearance for voting changes was explicitly outlined in the case of *Allen v. State Board of Elections*. Those election changes that fell under preclearance were categorized as " (1) changes involving the manner of voting, (2) changes involving candidacy requirements and qualifications, (3) changes in the composition of the electorate that may vote for candidates who are given office, and (4) changes affecting the creation or abolition of an elective office."[18] Section 5 is the most active piece of the VRA, entitling the federal government to deny covered states and jurisdictions the ability to apply laws that would deny people the right to vote based on their race. The DOJ may ignore or object against the proposed statute and the jurisdiction may seek a judgment from the District Court of D.C. after such an objection or directly.[19] Section 5 would become a site of contention between state legislators and the federal government, as some perceived this as encroachment on state independence while others saw this as fundamental to protecting voter equality. Either way VRA (and especially Section 5) rejected, prevented, and discouraged the enactment of numerous discriminatory voter laws after its passage embodying the spirit of civil rights at the ballot box.[20]

## The Court, Congress, and the VRA before *Shelby*

[18] Mary Massaron Ross, "The Voting Rights Act," *The Urban Lawyer*, 1993, pg 928.
[19] *Allen v. State Board of Elections*, 393 U.S. 544 (1969).
[20] Lopez, "'Shelby County': One Year Later," pg 8.

In the case of *South Carolina v. Katzenbach* the Supreme Court was able to confront the constitutionality of Congress's drastic action with the passage of the Voting Rights Act. The state of South Carolina questioned the constitutionality of preclearance in the VRA, specifically as an encroachment into the state's rights to regulate elections as granted in Article I, Section 4, Clause 1 of the Constitution. The Supreme Court affirmed the constitutionality of the VRA, describing preclearance, bailout, and the coverage formula as legitimate needs justified by Congress. Famously, Justice Warren describes racial discrimination in voting as "an insidious and pervasive evil which had been perpetuated in certain parts of our country throuh unremitting and ingenious defiance of the Constitution."[21] These unique circumstances combined with the clear enforcement powers of the Fifteenth Amendment reaffirmed the Court's 8-1 decision validating Congress's authority to enact the VRA.

The Court recognized that case by case adjudication of the Fifteenth Amendment was not efficiently addressing the issue of voter suppression, nor were the financial or time costs feasible.[22] They instead pointed out that Congress had carefully considered all their options in enforcing the Fifteenth Amendment, as they are constitutionally empowered to, and found that the VRA was the appropriate remedy. Section 2 of the VRA on its own would not be suitable for the sheer volume of historical discrimination present in U.S. elections, Congress felt it necessary to pass preclearance for this reason.[23] Deference to congressional intention was crucial to the constitutionality of the VRA being upheld in *Katzenbach*. Those unique circumstances described by Justice Warren in electoral history are considered by the *Shelby* dissent to have metamorphosized into second generation voter discrimination tactics, and for the majority to have dissolved entirely.

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[21] *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).
[22] *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).
[23] Olds, "More than "Rarely Used": A Post-"Shelby" Judicial Standard for Section 3 Preclearance," pg 2210.

The decision made by the Supreme Court in the case of *Allen v. State Board of Elections* in 1969 widened the breadth of the VRA's preclearance principle. The basis of the case was a set of candidates and voters from Virginia and Mississippi who believed changes to the election laws of their states had unreasonably avoided the preclearance clause. They were attempting to show how these changes to election law "a voting qualification or prerequisite for voting, or standard, practice or procedure with respect to voting" fell under the Section 5 of the VRA and were thus enforceable prior to federal preclearance.[24] Changes to voting laws that would constitute even the smallest change in procedure were capable of producing racial inequality, and arguably fell under preclearance requirements. The concept of "vote dilution," diminishing the value or influence of an individual's vote, was heavily referred to in this case from *Reynolds v. Sims* which established the "one person one vote principle."[25] Beyond this, the *Allen* decision granted access for private individuals to file local suits when they perceived a Section 5 violation. Expansion occurred for both the content under which Section 5 can apply and those who have access to it.

A contrasting notion from *Shelby* cited in the majority opinion by Justice Warren in *Allen v. State Board of Elections* is congressional legislative intent. The majority justified the inclusion of small shifts to voting laws under Section 5 as being purposefully included by the legislators in the formulation of the VRA. Since it was intentional and direct, the Court approached the case with respect for the legislators and for a constitutionally valid law, simply interpreting it within their own branch. This is not a new legal concept, it is however particularly charged in the case of voting rights and the balance between federal/local legislation. Justice Warren writes,

> We are convinced that in passing the Voting Rights Act, Congress intended that state enactments such as those involved in the instant cases be subject to the Section 5

[24] *Allen v. State Board of Elections*, 393 U.S. 544 (1969).
[25] Olds, "More than "Rarely Used": A Post-"Shelby" Judicial Standard for Section 3 Preclearance," pg 2191.

> approval requirements. The legislative history on the whole supports the view that Congress intended to reach any state enactment which altered the election law of a covered state in even a minor way.[26]

It will become apparent that the Supreme Court devalued the legislative intent of Congress in the *Shelby* case, discounting the impact the VRA's repassage was meant to have. The intent of the legislation remains clear, yet other factors are weighed more heavily against it under the guise of dual federalism. The Supreme Court many decades after the decisions of *South Carolina v. Katzenbach* and *Allen v. State Board of Elections* would come to overturn the enforcement powers aka "the teeth of the VRA" when *Shelby County v. Holder* nullified the Section 4(b) coverage formula.

The case of *Northwest Austin v. Holder* is referenced throughout the *Shelby* case with relation to Section 5 of the VRA. The constitutional questions at hand were what political subdivisions are included under Section 4(a) bailout, and was Section 5's renewal in 2006 constitutional under Congress's 15th Amendment powers?[27] In the majority opinion written by Chief Justice Roberts, the Court took a broad approach to categorizing political subdivisions and refused to answer on Section 5's constitutionality. The ruling was not intended to set wide judicial precedent on how to address VRA questions, it was distinctly case specific.

Northwest Austin Municipal Utility District Number One, that did not register voters yet did hold elections, was denied bailout under the VRA since the state of Texas as a whole was a covered jurisdiction.[28] The lower courts also decided that a district without voter registration that still had an elected board was ineligible for bailout. In a unanimous decision the Supreme Court decided Congress's intention with the bailout provision would enable such a flexible

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[26] *Allen v. State Board of Elections*, 393 U.S. 544 (1969).
[27] *Northwest Austin Municipal Utility District No. 1 v. Holder*, 557 U.S. 193 (2009), pg 2.
[28] *Northwest Austin Municipal Utility District No. 1 v. Holder*, 557 U.S. 193 (2009).

understanding of a political subdivision to go beyond that outlined in Section 14 when applied to bailout and preclearance.

Although the case decided the applicable definition for a political subdivision, the majority opinion in *Shelby* would refer to *Northwest Austin* when discussing the contemporary need for Section 5 of the VRA. Yet this case was not ruling on Section 5, just making a general comment that "The Act imposes current burdens and must be justified by current needs."[29] This aside made by the Court in the *Northwest Austin* decision would be a backbone of the *Shelby* majority's argument while Justice Ginsburg would lean more heavily on constitutional avoidance in the dissent. This concept of constitutional avoidance is tailored in the *Northwest Austin* case to apply as "The Fifteenth Amendment empowers Congress, not the Court, to determine in the first instance what legislation is needed to enforce it."[30] Avoiding the question of constitutionality maintained the delicate balance of judicial and legislative branches by reserving the bulk of the VRA for Congress to decipher. The way the Court commented on constitutional avoidance and current needs would be extrapolated from *Northwest Austin v. Holder* into a strikingly different context in *Shelby County v. Holder*.

## The Court and Congress in *Shelby County v. Holder (2013)*

### Facts of the Case and Judicial Questions

On June 25, 2013 the Supreme Court of the United States issued a 5-4 decision to deem Section 4(b) of the Voting Rights Act unconstitutional. The ruling was on the case of *Shelby County v. Holder* in which a preclearance covered jurisdiction from Alabama appealed after having "sued the Attorney General in Federal District Court in Washington, D.C., seeking a declaratory judgment that sections 4(b) and 5 are facially unconstitutional, as well as a

[29] *Northwest Austin Municipal Utility District No. 1 v. Holder*, 557 U.S. 193 (2009), pg 8.
[30] *Northwest Austin Municipal Utility District No. 1 v. Holder*, 557 U.S. 193 (2009), pg 10.

permanent injunction against their enforcement."[31] When the lower courts upheld the constitutionality of these VRA sections, the Supreme Court granted *certiorari* and thus the judicial declawing of the VRA began.

The facts of the case follow the 2006 renewal of all portions of the VRA by Congress, with broad bipartisan support. The coverage formula, Section 4(b) as described previously, was reevaluated and maintained as a legislatively integral portion of preclearance. The clear intention of renewing the VRA, along with a few newer amendments to expand coverage, was to continue to maintain and advance voting rights for all U.S. citizens. Not just as a general reaffirmation of electoral equality, the VRA serves a historical role in enforcing the Fifteenth Amendment in order to protect the voting rights of Black Americans and now linguistic minorities.[32] During the process of renewing the VRA "Congress amassed over 15,000 pages of testimony documenting continuing instances of racial discrimination in voting in the covered jurisdictions since 1982."[33] It was with careful consideration that they utilized their 15th Amendment Section 2 power to "enforce this article with appropriate legislation." The Court acknowledged that Section 4(b) and Section 5 were the only portions of the VRA under debate as "Section 2 is permanent, applies nationwide, and is not at issue in this case."[34] The crux of the constitutional question at hand was: Did Congress overstep its Fifteenth Amendment powers with Section 4(b) of the VRA and infringe upon States' powers in the Tenth Amendment and Article Four of the Constitution? [35]

Yet, jurisdictions such as Shelby County, Alabama who possess legacies of voter suppression and racial discrimination decided to facially challenge these portions of the VRA.

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[31] *Shelby County Alabama v. Holder*, 570 U.S. 529 (2013), pg 2.
[32] Albert Samuels,"Shelby County v. Holder: Nullification, Racial Entitlement, and the Civil Rights Counterrevolution," *Ralph Bunche Journal of Public Affairs 4*, no .1 (2015), pg 191.
[33] Samuels, "Shelby County v. Holder: Nullification, Racial Entitlement, and the Civil Rights Counterrevolution," pg 190.
[34] *Shelby County Alabama v. Holder*, 570 U.S. 529 (2013), pg 1.
[35] *Shelby County Alabama v. Holder*, 570 U.S. 529 (2013), pg 2.

The crucial characteristic of a facial challenge of constitutionality is that it declares the law unconstitutional in its entirety, not just as the specific application described in the case brought to the Court. So, Shelby County was a vehicle for an entire federal takedown of the VRA's preclearance power through a facial challenge. The racial implications, and practical application, are detrimental to small "d" democracy. In the partisan sense, Republicans benefited from this decision as it cleared them to move closer to controlling election outcomes on the local, state, and federal levels. One only needs to look at the changes made in the wake of the *Shelby* ruling. It is obvious "Republicans' political incentives point unambiguously toward the enactment of additional franchise restrictions. In the brief period of time that has elapsed since *Shelby County* was decided, officials in Alabama, Florida, Mississippi, North Carolina, Texas, and Virginia already have announced their intention to pass or implement photo ID laws and other similar measures." [36] It is difficult to avoid the conclusion that the Republican Party is leveraging this to decrease the turnout or effective representation of minority and Democratic voters.

Discriminatory changes to elections, either explicitly or through their impact, that may have been denied to a precleared jurisdiction can now operate through legal channels post *Shelby*. The prevention of that harm being done to a voter no longer exists without Section 4(b) and the neutered Section 5. Responsive rulings, using the 15th Amendment or VRA Section 2, have become the only channel of resolution for voters facing discrimination without the protection of proactive preclearance.

Justice Ruth Bader Ginsburg dissented with Justices Sotomayor, Kagan, and Breyer that this decision would cause irreparable harm to minority voters. Justice Roberts writing on behalf of Justices Scalia, Kennedy, and Alito, prioritized arguments of state power and modernity to

[36] Nicholas Stephanopoulos, "The South After Shelby County," *The Supreme Court Review*, January 2014, pg 60.

preclearance concerns. In just a single decision, *Shelby* fundamentally altered portions of American identity for years to come: minority oppression and the right to vote.

## Argument of Time

In beginning the majority opinion, Justice Roberts asserts his central argument that the coverage formula of Section 4(b) is an antiquated tool. To subject jurisdictions to preclearance using decades old data, which itself was based on historical data, seems inefficient to address any present day concerns regarding voting rights. In juxtaposition, this same argument of time is vital to Justice Ginsburg's dissent that "if it ain't broke don't fix it."

Justice Roberts concedes that "voting discrimination still exists."[37] He then goes on to counter and diminish his own claim by explaining the lasting improvements which the VRA has made since its introduction in 1965. So although voting discrimination is alive and well, it is not as bad as it was in the 60s. Although voting discrimination is alive and well, the VRA has fixed heinous barriers like poll taxes and literacy tests. Repetition of this acknowledgment doesn't reduce the severe impact voting suppression has had in the lives of many. In the present context, 2013 for this case, Justice Roberts insists that the voting climate has shifted and Congress's unique prerogative to enforce the VRA has expired. He explains "The conditions that originally justified these measures [the VRA] no longer characterize voting in the covered jurisdictions…Since that time, the Census Bureau data indicate that African-American voter turnout has come to exceed white voter turnout in five of the six States originally covered by Section 5."[38] The majority's approach to the "outdated" coverage formula (last altered in 1975) is that it surely is in need of repair due to its age, even though Congress continues to reapply it. The coverage formula did serve its legislative purpose in covered jurisdictions and aided in

[37] *Shelby County Alabama v. Holder*, 570 U.S. 529 (2013), pg 2.
[38] *Shelby County Alabama v. Holder*, 570 U.S. 529 (2013), pg 2.

desegregating the vote. If the statistics of voter turnout are any indication of improvement, which they are, then the majority believes the coverage formula should be modified to reflect the changes made in the decades since its formation.[39]

Justice Ginsburg too appreciates how effective the coverage formula has been in granting minorities access to the franchise. Coming forward with the same statistics available to her argument, she forcefully reminds the Court that the coverage formula is effective. Congress took intensive care to evaluate the formula and its accuracy in present application, coming to the conclusion that it was still functioning as intended.[40] Foreshadowing the argument of legislative intent and Congressional power, Justice Ginsburg emphasizes that the Court should not play a role in deciding the effectiveness of a legislative action constitutionally granted to Congress. However, in regards to the argument of time she comes forth with an iconic visualization of throwing away an umbrella in a rainstorm explaining "The sad irony of today's decision lies in its utter failure to grasp why the VRA has proven effective. The Court appears to believe that the VRA's success in eliminating the specific devices extant in 1965 means that preclearance is no longer necessary."[41] The dissent feels that the decades of improvement through the implementation of preclearance displays reason enough for its continued use. It is difficult for a reader to rectify this dissociation when comparing the dissent and majority opinions. Using the same evidence of voting rights thriving under VRA preclearance two diametrically opposite conclusions are drawn about its present role.

Both sides frequently refer to the case of *Northwest Austin v. Holder* in which the notion that the VRA "imposes current burdens and must be justified by current needs" is introduced.[42]

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[39] William Yeomans, "After 'Shelby County,'" *Human Rights Journal*, no.2 (2014).
[40] Levitt, "Before the United States Senate Committee on the Judiciary Subcommittee on the Constitution, Civil Rights and Human Rights New State Voting Laws: Barriers to the Ballot?".
[41] *Shelby County Alabama v. Holder*, 570 U.S. 529 (2013), pg 36.
[42] *Northwest Austin Municipal Utility District No. 1 v. Holder*, 557 U.S. 193 (2009).

Once again, the majority defines the coverage formula as too old to satisfy current needs and assumes it subsequently cannot be a constitutional current burden. Justice Roberts repeatedly mentions the last update to the coverage formula could not have possibly factored in the current political climate nor electoral evidence when establishing its coverage requirements. If the current burden is still rooted in a formula from the 70s there is little reason to assume current needs are being well attended. He goes so far as to say the formula is overly historical and that the Fifteenth Amendment "is not designed to punish for the past; its purpose is to ensure a better future."[43]

Looking at identical concepts of current needs and current burdens, Justice Ginsburg interprets the Katz study as evidence that the current needs of modern America still necessitate the coverage formula in place. The study conducted by Congress evaluated the frequency of Section 2 VRA cases between covered and noncovered jurisdictions. In putting this study in conversation with *Northwest Austin* she writes "One would expect the rate of successful Section 2 lawsuits would be roughly the same in both areas. The study's findings, however, indicated that racial discrimination in voting remains concentrated in the jurisdictions singled out for preclearance."[44] This finding further pushes the extreme need for preclearance, as even with prevention of numerous discriminatory laws these jurisdictions have frequent Section 2 violation cases. Although the coverage formula was reverse engineered to encompass former slave states and historically racist regions, the Katz study bolsters the dissent's claim that current needs are indeed being addressed by the current burden of the coverage formula. More generally, this nugget of judicial wisdom removed from the *Northwest Austin v. Holder* case was never intended to broaden the scope of the VRA's constitutional evaluation. At the time of the ruling in 2009 the

[43] *Shelby County Alabama v. Holder*, 570 U.S. 529 (2013), pg 2.
[44] *Shelby County Alabama v. Holder*, 570 U.S. 529 (2013), pg 20.

Court chose to invoke constitutional avoidance to ignore the question of Section 5's constitutionality. The *Northwest Austin v. Holder* ruling strictly answered on what a political subdivision entailed, so the weight current needs/burdens holds in the *Shelby* decision is somewhat dumbfounding.

The coverage formula and preclearance in combination prevent legislation of voter discrimination, as recognized by Congress, thus justifying the continued use of the coverage formula. If the formula was to be rebuilt, then these covered jurisdictions would not have an ample amount of evidence exposing their proclivities to discriminate, due to the presence of preclearance. As the Katz study exposes the continued need for Section 2, it can simultaneously accentuate that there would be an even more abundant volume of cases under Section 2 if preclearance were to be removed. Under Section 4(b) jurisdictions who may consider passing laws to alter elections, such as reducing the amount of poll hours, are deterred from taking action.

With fear of DOJ retaliation, there is a visible application of preclearance serving its purpose: to protect voting rights when those in power wish to reduce the vote of minorities. As new laws are prevented from inflicting harm, old laws are kept inoperative. Justice Ginsburg compels the majority to recognize the role of the coverage formula in prohibiting backsliding. The role of Section 5, empowered by Section 4(b), is equally influential in the voting rights sphere as its role as a deterrent force. Justice Ginsburg goes on to cite a change blocked by preclearance in Shelby County itself that was intended to annihilate the only majority-Black district through the redistricting process.[45] The resulting removal of a Black incumbent after the city ignored the DOJ's objection is one such example of backsliding. As falling into the pattern

[45] *Shelby County Alabama v. Holder*, 570 U.S. 529 (2013), pg 27.

of this case, the majority decision neglects to counter the idea of backsliding and instead pursues more reasoning of current improvement since 1965.

At its core, the *Shelby County v. Holder* decision is an anomaly where two groups of people experience the same event with polar opposite recollections at the end. Since the nation is in a drastically different place than it was with the VRA's passage in 1965, and Section 4(b)'s reaffirmation in 1975, Justice Roberts believes the coverage formula would be in an inherently different form as well. Speaking on behalf of the majority, the decision prioritizes their concept of current needs which would in their eyes require a newer coverage formula. Justice Ginsburg for the dissent stands across the way, seeing the immense injury that would occur with the removal of the coverage formula as cited in the Katz study. Backsliding, slews of new discriminatory changes, and restriction of the franchise would be imminent. It is perplexing to have a commonly understood starting point (that the VRA has made great strides in voting rights) that diverges into competing arguments of its continuance or its disembowelment.

## Argument of States' Rights

Equal sovereignty is the notion that each state stands on equal footing within the Union. During the period of growth from colonial America into the present United States, equal sovereignty applied to the same set of terms entering statehood. There is no true constitutional citation for this principle, other than a mere allusion to the Tenth Amendment or the Elections Clause of Article Four. Citing the commentary in *Northwest Austin v. Holder*, Justice Roberts notes that discriminating between the States requires the coverage to be "sufficiently related to the problem that it targets."[46] To have such a strong shift away from what the majority considers to be a principle of U.S. democracy, equal sovereignty, then there must be sufficient reasoning in

[46] *Northwest Austin Municipal Utility District No. 1 v. Holder*, 557 U.S. 193 (2009).

this inequality. Justice Ginsburg combats this application of equal sovereignty in *Shelby,* instead rooting her argument in the precedent set by *South Carolina v. Katzenbach*.

*Northwest Austin v. Holder* seems to conflict with *South Carolina v. Katzenbach* on exactly how far equal sovereignty can extend. The majority, citing *Northwest*, claimed the coverage formula was not adequately related to the problem of discriminatory election laws. Once again, their reasoning was that the outdated nature of the formula meant it lacked standing to be applied in the present day. Justice Roberts points out "It would not have been irrational for Congress to distinguish between the states in such a fundamental way based on 40-year-old data, when today's statistics tell an entirely different story. And it would have been irrational to base coverage on the use of voting tests 40 years ago, when such tests have been illegal since that time."[47] This requires the assumption taken from *Northwest* that equal sovereignty extends past a state's admittance into the Union. For this reason, if states need to be under equal federal control it would be unfair for some states to need preclearance prior to enacting legislation while others can smoothly integrate election changes.

In disagreement, Justice Ginsburg says that equal sovereignty is wholly limited to those conditions under which the state may enter the Union. The precedent of *South Carolina v. Katzenbach* declared, "the principle [equal sovereignty] applies only to the terms upon which States are admitted to the Union, and not to the remedies for local evils which have subsequently appeared."[48] With these totally different pieces of evidence before them, the majority and dissenting opinions can find no common ground on which to comprehend equal sovereignty. Even if Justice Ginsburg had conceded that equal sovereignty did apply post-entrance, she could have easily rationalized the basis for discriminating amongst the states in pursuit of the problem

[47] *Shelby County Alabama v. Holder*, 570 U.S. 529 (2013), pg 23.
[48] *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

of voter discrimination. Even with this, she cites the severability provision of the VRA which enables certain jurisdictions to bailout partially when it constitutionally violates the specific area of the VRA without being deemed facially unconstitutional for all.[49] Reflecting on the argument of equal sovereignty amongst the states, Section 4(a) the bailout provision is another swift tool to allow covered districts who have clearly remedied their discrimination over time relief from preclearance as opposed to releasing all jurisdictions both guilty or not. Congress had clearly thought this through so that covered jurisdictions from the 1960s would not be forever trapped under the federal eye unless necessary.

The mounting argument of legislative intent continues to build, pointing to the substantial evidence compiled by Congress proving that the coverage formula is effective at its point of renewal in 2006. If there are any circumstances that could judicially authorize inequality between the states, it should be in service of blocking legislation that hopes to deny or abridge the right to vote on account of race or color.[50] Yet, the majority continues to turn a blind eye to the real world application of this decision. Looking back to ideals of state equality and means targeted towards an end, the diligent work of Congress to protect people's right to vote is discounted. Whether or not it is obvious which States would have an easier time legislating racially charged discriminatory laws, the fact that some are more motivated to do so than others should serve as sufficient reasoning for Congress to apply the VRA as it sees fit. In this instance, targeting states with legacies of racism will indeed produce the outcome of furthering voter equality via preclearance. Accordingly, if the scope of equal sovereignty remained frozen or fluidly applied, unequally covering the states through Section 4(b) of the VRA can be justified as necessary to protect the voting rights of minorities.

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[49] *Shelby County Alabama v. Holder*, 570 U.S. 529 (2013), pg 29.
[50] Stephanopoulos, "The South After Shelby County," pg 55.

## Argument of Legislative Intent

Congress was explicitly granted the power to enforce the Fifteenth Amendment upon its passage, and responded in 1965 by passing the Voting Rights Act. Not only has the VRA had bipartisan support throughout its congressional history, but it also has since collected copious amounts of information on voting rights and racial discrimination throughout the nation.[51] The majority opinion in *Shelby* acknowledges the unique circumstances and powers which Congress legislated under during the Civil Rights Movement. Justice Ginsburg exposes the work behind this unique power by directing the reader to the intensive process which Congress undertook in order to reauthorize the VRA, especially Section 4(b). Justice Roberts, as on most issues arising in this case, fuels his argument with a calling to contemporary needs and introduces a rational basis question.

Harkening back to the *Katzenbach* decision, Justice Roberts insists on theoretical and applicable rationality in order to constitutionally validate the coverage formula. He reflects "The formula looked to cause (discriminatory tests) and effect (low voter registration and turnout) and tailored the remedy (preclearance) to those jurisdictions exhibiting both."[52] The majority concludes that Section 4(b) usurps the powers of the States now more than ever, as it no longer stands to be constitutionally justified as a valid power of Congress to enforce the Fifteenth Amendment. Since the discriminatory tests referred to above are no longer in practice, Justice Roberts indirectly proposes that the overall target of the VRA - and thus it's mechanisms- should be reevaluated.

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[51] Ryan Post, "The Implications of Shelby County v. Holder: How the Supreme Court Undid Fifty Years of Social Progression," *Seton Hall Law,* (2015).
[52] *Shelby County Alabama v. Holder*, 570 U.S. 529 (2013), pg 17.

The coverage formula is put through the test of modernity again as Justice Roberts summarizes its reverse engineered origin not being suitable to today's "less polarized" climate.[53] He goes so far as to say the geographical basis for the coverage formula, predominantly dictated by Southern slave states and Northern free states, leaves it irrational for today's standards. Challenging Congress's intention and interpretation of their VRA goals, Justice Roberts summarizes "The Government falls back to the argument that because the formula was relevant in 1965, its continued use is permissible so long as any discrimination remains in the States Congress identified back then – regardless of how that discrimination compares to discrimination in States unburdened by coverage."[54] It is not that the majority discredits Congress's role as legislator and enforcer of the Fifteenth Amendment; they do however seek to undermine how it has chosen to wield this power.

In the delicate balance between judicial oversight and legislating from the bench, Justice Roberts continues to question Congress's thoroughness. Essentially, the original legislative intention of the VRA is cited as preventing older issues like voting tests. Yet, the majority believes Congress is trying to apply the old coverage formula to prevent new complex issues such as vote dilution.[55] Although this evolution in the meaning of the VRA is accepted by the dissent, the majority finds it to be too far of a stretch from the rational basis of Section 4(b) coverage. According to Justice Roberts, if Congress wishes to apply its Fifteenth Amendment powers through the VRA to prevent modern issues of voter discrimination laws by preclearance, it should also have to apply a new coverage formula.

Justice Ginsburg, unsurprisingly, objects to this disregard of legislative intent. In beginning her evaluation of Congress's power to apply the VRA, she asserts that the Court

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[53] *Shelby County Alabama v. Holder*, 570 U.S. 529 (2013), pg 19.
[54] *Shelby County Alabama v. Holder*, 570 U.S. 529 (2013), pg 19.
[55] *Shelby County Alabama v. Holder*, 570 U.S. 529 (2013), pg 20.

should not be overstepping into something constitutionally reserved to the legislature.[56] From the perspective of *stare decisis*, the Supreme Court has long deferred to Congress with extraordinary power to enact the Civil War Amendments. Calling back to the case of *McCulloch v. Maryland*, Justice Ginsburg affirms "The stated purpose of the Civil War Amendments was to arm Congress with the power and authority to protect all persons within the Nation from violations to their rights by the states."[57] The Court's previous respect for this Congressional boundary should be sustained into the continuance/reaffirmation of any such logical portions of legislation.[58]

Justice Ginsburg makes it blatantly clear that there are three elements which a rational basis requires. First there should be "a legislative record justifying the initial legislation."[59] Second, there is usually a time limit on provisions of the Act which make it suitable for reevaluation. Third, there should be a general consensus amongst the Court that Congress's evidence for reauthorization will be more subtle than the original legislative record of justification. With this three pronged approach applied to the Voting Rights Act, the dissent finds all elements to be fully satisfied and thus unnecessary for the Court to deem any portion unconstitutional.

The substantial legislative record, as one of Justice Ginsburg's three requirements for rational basis, is the strongest support of Congress's constitutional choice to reaffirm Section 4(b). The dissent's affirmation of the coverage formula's reauthorization comes down to the clear evidence provided in the decision making process. It was not a mindless, random, or repetitive passing as implied by Justice Robert's time argument. The sheer volume of work alone should shock the Court since "Congress amassed over 15,000 pages of testimony documenting instances

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[56] *Shelby County Alabama v. Holder*, 570 U.S. 529 (2013), pg 2.
[57] *Shelby County Alabama v. Holder*, 570 U.S. 529 (2013), pg 10.
[58] "Congressional Power Under the Civil War Amendments."
[59] *Shelby County Alabama v. Holder*, 570 U.S. 529 (2013), pg 11.

of racial discrimination in voting in the covered jurisdictions since 1982."[60] Although the manner in which voter discrimination is implemented may have evolved, it is still a prevelant issue. The U.S. Congress took care to consider the evidence before them and the dissent even points out the nuance behind such a legislative evaluation. Justice Ginsburg elaborates, "If the statute was working, there would be less evidence of discrimination, so opponents might argue that Congress should not be allowed to renew the statute. In contrast, if the statute was not working, there would be plenty of evidence of discrimination, but scant reason to renew a failed regime."[61] This speaks to her request that the Court stay cognizant that any present justification for reauthorization would be less vivid for precisely this reason. Congress, not the Court, is empowered constitutionally and resourcefully to determine the best means to the end.

Justice Ginsburg asserts once more that the Court should not be supplanting its will for that of Congress, since that is not in their power of judicial review.[62] She puts it simply "The Court should have left the matter where it belongs: in Congress' bailiwick."[63] Of course this means Justice Roberts, a broken record at this point in the *Shelby* decision, asks Congress to update its mechanism of coverage to reflect what the present nation demands. The time, energy, and deliberation which was spent on revalidating the VRA's coverage formula should serve as rational basis for the Court to defer to legislative intent in this instance. Congress's legislative goal to prevent voter discrimination is well served through its continued use of the preclearance coverage formula.

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[60] Samuels, "Shelby County v. Holder: Nullification, Racial Entitlement, and the Civil Rights Counterrevolution," pg 190.
[61] *Shelby County Alabama v. Holder*, 570 U.S. 529 (2013), pg 12.
[62] *Shelby County Alabama v. Holder*, 570 U.S. 529 (2013), pg 12.
[63] *Shelby County Alabama v. Holder*, 570 U.S. 529 (2013), pg 23.

## Argument of Section 2 Remedy

In order to minimize their destruction of preclearance, the majority in *Shelby* attempts to oversell Section 2's ability to rectify any possible voting rights violations under the VRA. The majority never concedes that they have ravaged the preclearance process as a whole. The decision is deceptive in a manner since it "Did not strike down Section 5, but without Section 4, the later section is without significance – unless Congress passes a new bill for determining which states would be covered."[64] To mirror the linguistic style of Justice Ginsburg the *Shelby County v. Holder* ruling left a car with no gas, a pool with no water, or a gun with no bullets. Without Section 5 having any jurisdictional coverage to pull into preclearance, Section 2 stands as the sole mechanism for the adjudication of voter discrimination cases.

Within the *Shelby* decision, Section 2 is not under evaluation. One of the first clarifications made by Justice Roberts is that "Section 2 is permanent, applies nationwide, and is not at issue in this case."[65] Even though it still remains in place, Section 2 could not possibly have an impact comparable to Sections 4 and 5 preclearance. As opposed to preclearance, Section 5 is a remedy which requires harm to have occurred in order to be evaluated on a case by case basis.[66] With the deterrent element vanquished from VRA's Section 5, the burden of proof now rests on voters to prove jurisdictional laws are discriminatory to their 15th Amendment right to vote.[67] Not even considering the second generation barriers to voting raised by Justice Ginsburg, the burdens of time and financial stress will serve as deterrents for people to employ Section 2. The amount of Section 2 violations that occurred even while preclearance was in place

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[64] Adam Liptak, "Supreme Court Invalidates Key Part of Voting Rights Act," *The New York Times*, June 25, 2013, pg 3.
[65] *Shelby County Alabama v. Holder*, 570 U.S. 529 (2013), pg 3.
[66] Lopez, "'Shelby County': One Year Later," pg 6.
[67] Christopher Elmendorf and Douglas Spencer, "Administering Section 2 of the Voting Rights Act After Shelby County," Vol. 115, No. 8, *Columbia Law Review*, 2015, pg 2148.

shows how insufficient this portion will be when left without the assistance of the DOJ to block discriminatory laws.[68]

In looking to *Katzenbach* again for the justification of the VRA's preclearance intensity it's shown, "Case-by-case litigation had proved inadequate to prevent such racial discrimination in voting, in part because States 'merely switched to discriminatory devices not covered by the federal decrees.'"[69] The *Shelby* majority notes this as simply another reflection of the VRA in a time specific sense, limited in application to the circumstances at the time the court was evaluating the issues during *Katzenbach*. While Congress had been rightfully acting at that point, that decision no longer seems rational. Yet, for Justice Ginsburg this same quotation from *Katzenbach* only bolsters her argument that Section 2 continues to be inadequate as states craft new burdens for voters. Describing second generation barriers and vote dilution, Justice Ginsburg analogizes voting discrimination to a hydra beast being cyclically defeated, regrown, and refought.[70] This notion of old and new attempts to legally assert voter discrimination calls back to the faulty argument of time. What Roberts sees as moot issues like the outlawing of poll taxes, Ginsburg sees as lively threats like racial gerrymandering.[71] Although these nuanced forms of voter suppression have become the most egregiously popular threats to electoral democracy, the majority who so desperately cling to the argument of present needs casts them aside in favor of praising progress from the past.

Essentially, the majority chooses to highlight how much the U.S. has grown since the Fifteenth Amendment and the VRA, while the dissent acknowledges this but chooses to notice new ways the VRA could be a vehicle for further improvement. In response to this, Justice

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[68] Gerald Herbert. "An Assessment of the Bailout Provisions of The Voting Rights Act." *Berkeley Law*, 2006.
[69] *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), pg 12.
[70] *Shelby County Alabama v. Holder*, 570 U.S. 529 (2013), pg 2.
[71] Liptak, "Supreme Court Invalidates Key Part of Voting Rights Act," pg 2.

Roberts leaves the ball in Congress's court. Stating that as legislators they have a role to enforce the Fifteenth Amendment via the VRA, if they wish to do so they must move forward with a reconstruction of the coverage formula. In the meantime, the majority leaves the permanent Section 2 intact. The dam of preclearance was cracked and the floodgates of voter suppression laws burst forward onto the broken umbrella of the VRA.

**Congress and the States Post-Shelby**

The Supreme Court has historically respected and upheld the powers of Congress to legislate within their constitutional boundaries. The Civil War Amendments are no different, they are even regarded as better protected from questioning.[72] Through slavery and segregation, racial injustice has been a blight on the foundation of America. This unique situation provided unique roles for the legislature to fill during the time of the Fifteenth Amendment. Although people of color in the nation were constitutionally granted enfranchisement, the physical electoral process was riddled with voter suppression tactics. In the post-Fifteenth Amendment era a new wave of racial injustice has been enforced state-by-state via voter suppression tactics. Congress in the wake of the Civil Rights Movement and the death of prominent leaders employed their Fifteenth Amendment powers to pass the Voting Rights Act of 1965. For the Supreme Court to question the authority of a provision of the VRA decades after its passage, using vague principles of modernity and equal sovereignty is unexpected. The degree to which this decision curtailed the actions of Congress in exchange for the Court majority's own opinion on the formation of a law is unheard of. The *Shelby* decision marks a divergence from procedural and institutional norms leaving much unknown for the future balance of legislative/judicial powers.

With this in mind, deep consideration of the legacy of the Voting Rights Act must be put in discussion with present and future legal implications of the *Shelby County v. Holder* decision.

[72] "Congressional Power Under the Civil War Amendments." *Duke Law Journal,* (1969): 1247-1284.

The racial equality implications of this do not stand alone in their severe constitutional questioning, the case also serves as a landmark challenge of congressional authority by judicial oversight. Although this delicate back and forth between the Court and Congress is not unprecedented, this decision was a striking divergence from the Court's usual mode of operation. Compromising their tradition of deferring to the legislature on matters of the "Civil War Amendments," the majority in *Shelby* went so far as to say that the preclearance coverage formula was outdated and thus unconstitutional. Without citing specific constitutional provisions but only vague equal sovereignty ideals, the justices were able to decide that Congress' Fifteenth Amendment powers had been extrapolated beyond reason. The facial challenge brought in *Shelby* adds another layer of severity to the Congressional questioning. Yet with explicit powers granted by the Fifteenth Amendment, the Court still ruled to curtail and allow an invasion into the legislative domain.

## State Action

Under the guise of voter fraud and election integrity, Republican states that had previously been subject to preclearance under VRA Section 5 mounted a full legislative attack on minority voting rights. These laws that before *Shelby* would be subject to DOJ approval prior to their enactment include "changing district boundaries to disadvantage select voters, instituting more onerous voter identification laws, and changing polling locations with little notice."[73] Although there are no literacy tests or poll taxes as such, these new burdens target racial/ethnic minorities through financial and practical means. When information becomes hidden or confused, the average voter is not made aware of changes to their local/state voting process. For example when voter ID policies are made more stringent, cost to obtain and the ability to get to the location of a DMV present issues of accessibility.

[73] Human Rights Campaign, "John Lewis Voting Rights Advancement Act," October 8, 2021.

The Majority in *Shelby County v. Holder* would propose that these questions of discrimination can be firmly addressed using Section 2 of the VRA. Yet, this harm is being carried out at the moment onto countless citizens who wish to exercise their franchise rights with ease. As previously explained, Section 2 cannot handle the volume of cases which will arise without preclearance, nor does it carry forth every possible case due to the burdens of time and money on the injured party. Alongside the cost and duration required of Section 2 cases, "a discriminatory voting scheme may be in place for several election cycles before enough evidence is gathered to challenge it in court."[74] Unlike preclearance, Section 2 necessitates the infliction of discrimination prior to any legal remedy being made avaible. The shortcomings and limited scope of the VRA post *Shelby* is a playground for Republican legislators to write voter discrimination laws.

Many states that had been deterred from passing racially discriminatory election changes due to their covered status under Sections 4(b) and 5 began have since gone full-steam ahead with voter ID laws and voter roll purges. An extreme illustration of the action taken post-*Shelby* comes from North Carolina who implemented "strict voter ID, cutting early voting, eliminating same-day registration during the early voting period, ending the $2,000 child dependency tax deduction for parents whose college-student child votes where he or she attends school, and rescinding the automatic restoration of voting rights for ex-felons."[75] On the same day as the *Shelby* ruling "Texas officials announced they would implement the state's strict photo ID law, which was previously blocked by Section 5 because of its racial impact."[76] The eagerness of state legislators to swiftly write electoral changes, without fear of immediate DOJ backlash, was

[74] "The Impact of Shelby County v. Holder: Alive and Well," *Southern Poverty Law Center,* 2020, pg 9.
[75] Gilda R. Daniels, *Uncounted: The Crisis of Voter Suppression in America*, New York University Press, 2021, pg 53.
[76] Lopez, "'Shelby County': One Year Later," pg 2.

unsurprising but still alarming. In the year prior to *Shelby County v. Holder* the DOJ had reviewed 18,146 election law changes from Section 5 alone.[77] Now those potentially discriminatory laws could smoothly move forward to create hurdles for minority voters without preclearance. Imagining that Section 2 could correctly and quickly resolve any of the 18,146 laws that did prove to create discriminatory voting effects from 2012 would be ridiculous.

*Shelby County v. Holder* came to the narrow decision that an outdated preclearance coverage formula was so severely violating constitutional principles that it should be thrown out regardless of strong congressional evidence of its necessity. Analytically this may have appeared to be the right choice to prioritize equal sovereignty, modernity, and legislative thoroughness. Practically, the removal of Section 4(b) and the accompanying destruction of preclearance resulted in strides backwards in the fight for equal voting rights. A simple indication of how the U.S. stood after *Shelby* is that "nationally, voter turnout had plummeted to the lowest level since 1942."[78] Congress who had been empowered by the Fifteenth Amendment to improve basic elements of voting rights, such as registration, had done so through preclearance and had their choice judicially invalidated. This invalidation of the coverage formula's constitutionality has now left the nation in a state of imperiled democracy due to the reduction of the franchise.

## Congressional Action

In order to rectify this situation, Congress has attempted to update the coverage formula as prompted by Justice Roberts' opinion. With their Fifteenth Amendment power Congress's new goal is to rewrite provisions of the VRA to meet the objections the majority raised in *Shelby*. H.R.4, known as the John Lewis Voting Rights Advancement Act, is a direct response to the striking of Section 4(b) by the *Shelby County v. Holder* decision. The passage of H.R.4 would

[77] Lopez, "'Shelby County': One Year Later," pg 7.
[78] Daniels, *Uncounted: The Crisis of Voter Suppression in America*, pg 48.

restore preclearance Section 5 power in accordance with the newly written coverage formula. This formula is detailed:

> A state and all of its political subdivisions shall be subjected to preclearance of voting practice changes for a 10 year period if: 15 or more voting rights violations occurred in the state during the previous 25 years; 10 or more violations occurred during the previous 25 years, at least 1 of which was committed by the state itself; or 3 or more violations occurred during the previous 25 years and the state administers the elections.[79]

The Act would enable federal observation of covered jurisdictions during the voting period including Election Day, create a "modernized" coverage formula, and require public notification of changes to voting 180 days prior to an election.[80]

The John Lewis Voting Rights Advancement Act has already been passed by the House of Representatives on August 24, 2021. Discussion in the Senate has faced loud backlash from Republicans who claim the bill is an encroachment into state powers over elections and is unreasonably burdensome with room for much inaccuracy. Senators such as Ted Cruz harken back to an idea, much like that spoken by Justice Roberts, that the United States is in a different time and place than 1965.[81] Yet, this notion that discrimination has been radically eliminated is not statistically feasible. Poll taxes may have disappeared but there are new forms of voter suppression and racial inequality in the electoral system. As the recent evidence shows, "In 2021 alone, at least 19 states enacted at least 34 laws that make it harder to vote, while at least 13 restrictive voting bills have been pre-filed for 2022 legislative sessions and no fewer than 152 restrictive voting bills will carry over from last year."[82] All of these laws would be in locales

[79] "H.R.4 - John R. Lewis Voting Rights Advancement Act of 2021," Congress.gov, August 25, 2021. https://www.congress.gov/bill/117th-congress/house-bill/4
[80] Human Rights Campaign, "John Lewis Voting Rights Advancement Act." October 8, 2001.
[81] Andrew Garber, "Debunking False Claims About the John Lewis Voting Rights Act," *Brennan Center for Justice*, January 13, 2022, pg 2.
[82] Garber, "Debunking False Claims About the John Lewis Voting Rights Act," pg 5.

covered by the proposed coverage formula of H.R.4, and preclearance can prevent the erroneous harm they will surely cause minorities.

H.R.1, the For the People Act, is a much bulkier piece of legislation which was also passed in the House of Representatives. This Act covers a broader range of topics to facilitate easier access to the vote beyond the VRA's preclearance tactic. These additional steps outlined by H.R.1 signal that the legislature is ready to double-down on enfranchisement rights and take action through federal powers. Crucial portions of the bill require inclusive forms/periods of voter registration, campaign finance reform, and independent redistricting commissions. One issue with having such a comprehensive approach to legislative protection of voting rights, is that strong partisan actors may choose to not support H.R.1 based on a single provision. Although the Act went through the House, the Senate's partisan divide (with Republicans not in favor) makes it an incredibly difficult task to pass H.R.1 without halting the filibuster. This is another repercussion of the *Shelby* decision where partisanship and selfishness overshadows democratic principles of equality. If these party politics were placed to the side, the greater challenge of voting rights and racial equality would be seen. The For the People Act is exactly as it claims to be, for the people. Its provisions would remove the burden of pursuing enfranchisement from individuals by allowing for federal oversight on election days and expanding ethical protections before and at the ballot box. The downsides of H.R.1 being complex and lengthy are clearly outweighed by the state of desperation the nation is left in post-*Shelby*. While Republicans in Texas, Alabama, and North Carolina are refurbishing their racist and classist laws Congress cannot sit by idly. Thus, H.R.1 is not a partisan choice but a democratic necessity for the continuation of the ideals embodied by the VRA.

In combination with the larger voting rights legislation proposed as H.R.1, the John Lewis Voting Rights Advancement Act can begin to repair the damage which *Shelby County v. Holder* inflicted on voting rights. As the first step taken by Congress in order to revive the Voting Rights Act's preclearance powers, this coverage formula is expected to withstand constitutional scrutiny under arguments of modernity and thorough legislative intent.[83] The roadblock standing between easily disenfranchising legislation and blocking racially charged voter discrimination is the partisan divide in the Senate. Unfortunately the powerful bipartisan support that was granted to the Voting Rights Act upon its enactment in 1965, and throughout its renewal until 2006 (where it passed 98-0) has faded out. The Republicans have adopted a discriminatory stance that what benefits their states, stories of voter fraud and faulty elections, should hold priority over democratic ideals of equal access to the vote. Discrimination has come to symbolize a new party platform of the Republicans and the South once again, just under the guise of election integrity. H.B.1, H.R.4, and the restoration of the preclearance process to its full potential is urgent to prevent further backsliding.

## Conclusion

Taking a step back from the formal legal and constitutional debates of the entire *Shelby County v. Holder* case, racial equity is jeopardized by the striking down of the Section 4(b) coverage formula. The protections that activists and minorities had fought for decades to attain and maintain has been endangered in one sweeping decision. Approaching these issues from a judicial lens is beneficial for arguments of academia, however it can alienate the real world implications that people of Color will face following the declawing of the VRA. What was once a firmly established right to ensure all races, ethnicities, and linguistic minorities had equal

[83] Michael Waldman, "A Crucial Boost for the John Lewis Voting Rights Advancement Act," *Brennan Center for Justice*, November 3, 2021, pg 2.

access to the ballot has now become threatened by the disembowelment of the preclearance clause. At one time there was slavery, the next Jim Crow segregation, and our current racial plight is that of legalized descrimination especially in the realm of representation at the polls. Racism wasn't evaporated with the Fourteenth Amendment, and racial voter discrimination didn't retire with the Fifteenth Amendment and VRA.

There is no one-step cure for how the American elections system can be brought to its most equitable form, but the VRA and the John Lewis Voting Rights Advancement Act is as close as the legislature has gotten. As horrifying as the recently blatant language of racism coming from the GOP has been, it is stained in the fabric of American democracy built on the backs of racial and ethnic minorities. It is the responsibility of the judicial, legislative, and executive branches to combat this sentiment by protecting people of Color in this country. Minorities cannot be effectively advocated for if they are not able to be heard through the weight of their votes, as equal citizens with an equal right to the franchise.

This cyclical tragedy of voter suppression, lack of representation, and bolstering of further racial driscrimination is less preventable with the dismantling of the VRA's preclearance clause.[84] Without Section 4(b)'s coverage formula, the Voting Rights Act's Section 5 preclearance is paralyzed after *Shelby County v. Holder.* Updating the formula with H.R. 4, recognizing the need for minority rights in the electoral process with H.R.1, and returning federal preclearance to its former reach and authority is essential to the fight for voting rights in the United States post *Shelby County v. Holder* (2013).

[84] Daniels, *Uncounted: The Crisis of Voter Suppression in America*, pg 46.

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